

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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LESLIE GRAHAM,

Petitioner,

v.

ATTORNEY GENERAL OF THE STATE
OF NEVADA,

Respondents.

Case No. 2:09-cv-01069-MMD-VCF

ORDER

This habeas matter comes before the Court for a final decision on the merits.

I. BACKGROUND

Petitioner Leslie Graham challenges his 1997 Nevada state conviction, pursuant to a jury verdict, of first-degree murder, in connection with the death of eight-month-old Chelsey Hachez from three skull fractures. He is serving a sentence of life without the possibility of parole. He challenged the conviction on direct appeal and state post-conviction review.

A. The Principal Factual Issue Presented

In the federal petition, petitioner presents three grounds alleging principally claims of ineffective assistance of trial counsel, which are described in greater detail *infra*. Petitioner alleges in principal part in the three grounds that he was denied effective assistance because counsel failed to present expert medical testimony in support of a defense theory of second-degree murder by child neglect. Such a defense theory would posit that the State had proved no more than that Graham failed to

properly respond to the infant's condition rather than that he committed child abuse by himself causing her three skull fractures.

B. Relevant Trial Evidence and Proceedings

On federal habeas review, the Court considers whether the state supreme court's rejection of petitioner's claims on the merits was either contrary to or an unreasonable application of clearly established federal law as determined by the United States Supreme Court, under standards outlined further *infra*. The trial evidence served as backdrop to the state supreme court's rejection of petitioner's ineffective-assistance claims. The Court accordingly first summarizes the trial evidence that relates to petitioner's claims.

The evidence at trial tended to establish, *inter alia*, the following.¹

As of April 6, 1996, 21 year-old Kimberly Hachez and her eight-month-old daughter Chelsey had been living with 32 year-old Leslie Graham in a Las Vegas apartment for a little over two months. Chelsey was Hachez' daughter with her husband, Eric Hachez, from whom she was separated and seeking a divorce. The Hachez couple had been married for only about a year prior to the separation. Kimberly and Eric Hachez had joint custody of the baby.²

Kimberly Hachez met Leslie Graham in September 1995 at their workplace, a home products store. When she left her husband on January 26, 1996, she moved in

¹The Court makes no credibility findings or other factual findings regarding the truth or falsity of evidence or statements of fact in the state court. The Court summarizes same solely as background to the issues presented in this case, and it does not summarize all such material. No statement of fact made in describing statements, testimony or other evidence in the state court constitutes a finding by this Court. The significance of other evidence or categories of evidence referred to by petitioner in support of his claims is addressed in the discussion of the particular claims. The present recital of the evidence constitutes only an overview for context. Any absence of mention of a specific piece of evidence or category of evidence in this overview does not signify that the Court has overlooked the evidence in considering petitioner's claims.

²Dkt. no. 37-1, Ex. 18, at 42-43, 45-46, 49-50 & 66-67; see also dkt. no. 37-5, Ex. 18d, at 13 & 31 (background factual material for extrapolating petitioner's age); dkt. no. 37-3, at 24-27 (further testimony regarding custody). Kimberly Hachez was 22 at trial.

1 with Graham. The relationship was one of “boyfriend-girlfriend,” and Hachez intended
2 to marry Graham.³

3 Hachez testified that in her experience Graham was “very good” with his two
4 daughters, and she considered him a “good father.” She testified that “[w]hen he first
5 started coming over, he was very good with Chelsey.” She told others that Graham
6 treated Chelsey like she was one of his own daughters and that he was “very good” with
7 her. She never saw Graham hit Chelsey, and she had no concerns leaving her with
8 him. Hachez also testified, however, that “[t]here was [sic] times that he would just not
9 really want to deal with her, but usually when he was drinking, that’s when that would
10 happen.”⁴

11 As of April 6, 1996, the couple was in the process of moving from Las Vegas to
12 Pahrump, Nevada. They had stayed the prior night at the former Days Inn in Pahrump.
13 The plan for the day was that Graham would take Chelsey with him to Las Vegas and
14 pick up some items from their old apartment while Hachez was at work in her new job.
15 Hachez testified that, for her at least, the drive to the outskirts of Las Vegas took
16 approximately “about an hour, hour and a half,” although Graham possibly could have
17 made it in less time.⁵

18 Graham left at approximately 8:50 a.m. with Chelsey in a car seat and a cooler
19 full of beer. Hachez testified that she did not recall seeing Graham drink any beer that
20 morning, but she was not paying attention and was “not really sure.” It would not have
21 been common for him to drink beer in the morning in their prior two months together.⁶

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23 ³Dkt. no. 37-1, Ex. 18, at 43-46, 63-65 & 66-67.

24 ⁴Dkt. no. 37-1, Ex. 18, at 64-66.

25 ⁵*Id.*, at 46-49, 56, 58-60 & 69. The Court notes, strictly in passing as backdrop,
26 that the Google Maps directions feature reflects that the drive from the 1101 South
27 Highway 160 address of the former Days Inn in Pahrump to the 6500 West Charleston
28 address of the couple’s apartment, via South Durango Drive from Highway 160 in town,
would cover 58.1 miles and take one hour and twelve minutes. Alternate routes instead
using more expressway in lieu of surface streets would add up to two minutes to the
drive.

⁶Dkt. no. 37-1, Ex. 18, at 56-57.

1 Kimberly Hachez strapped her daughter Chelsey into the car seat before they
2 left. She testified that the baby was alert, happy, and in good general health at that
3 time. (Dkt. no. 37-1, Ex. 18, at 70-71 & 73; see also *id.*, at 50-55 (overall health).)

4 At 10:25 a.m. on April 6, 1996, the 911 dispatcher for the Las Vegas Metropolitan
5 Police Department ("Metro") received an emergency call from Leslie Graham, which
6 was routed to a medical dispatcher. Graham stated that he hit or pushed his eight-
7 month old infant in the stomach and that she could not breathe. He said that the baby
8 had something coming from its nose but was not breathing and was just lying there
9 without moving.⁷

10 Las Vegas Fire Department Paramedic Eric Cheese was the first responder to
11 arrive at the scene. He found the baby on the floor with Graham also present. Graham
12 told Cheese that the baby had been crying, that he gave her a bottle with milk, that the
13 bottle fell off the bed, and that the baby reached for the bottle and fell off the bed.⁸

14 Mercy Medical Services Paramedic Paul Maiocco arrived only two to three
15 minutes after the fire department. Graham told Maiocco initially that the baby fell off the
16 bed and began having some kind of choking reaction, that he went to the baby and
17 gave a chest thrust, and that the baby then became unresponsive with no heartbeat.⁹

18 The infant exhibited no vital signs, with no heartbeat, pulse, systolic blood
19 pressure, electrocardiogram signal, unassisted respiration, or capillary refill. Her pupils
20 were fixed and unreactive to light.¹⁰

21 The paramedics sought to intubate the infant so that they could provide assisted
22 respiration. While doing so, they found substantial trauma to the back of her skull.¹¹

23 ⁷Dkt. no. 37-1, Ex. 18, at 19-25 (911 audio custodian testimony); see also *id.*, at
24 7-8 (unchallenged recital during the State's opening of the content of the 911 audio
25 played for the jury); *id.*, at 37-39 (discussion by counsel); dkt. no. 37-4, Ex. 18c, at 9-10
(closing).

26 ⁸Dkt. no. 37-3, Ex. 18b, at 32-33 & 36.

27 ⁹*Id.*, at 51 & 53-54.

28 ¹⁰*Id.*, at 44-50 (Maiocco).

¹¹*Id.*, at 33-35 (Cheese); *id.*, at 52-53 (Maiocco).

1 Cheese testified that he could actually feel the depression on the back of the
2 infant's skull. He testified that "[i]t was like part of her skull was detached from – it
3 wasn't – it wasn't a solid mass." To Cheese, a paramedic with over six years of
4 experience, this reflected that the infant had a fractured skull. He testified that it was a
5 "very bad" injury that he "would say . . . was inconsistent from just falling forward to
6 reach for a baby bottle."¹²

7 Maiocco testified that his Mercy paramedic coworker similarly noticed a large
8 hematoma, or pooling of blood under skin, at the back of the infant's skull. Maiocco
9 testified that when he then palpated the area, it felt, in lay terms, "very mushy" or "very
10 soft." As he related at trial, "[t]here was no sense of having [the back of the head] intact
11 with the skull and [the hematoma] covered most of the back of the head." He related
12 that the area was three inches in diameter, which covered most of the back of the head
13 for an eight-month old infant.¹³

14 Maiocco thereupon confronted Graham about his account as to what had
15 happened to the infant:

16 As we were – as I was examining the head realizing that the story didn't fit
17 quite into what he was telling us, I asked him or questioned him about any
18 kind of trauma to the patient's head. At that point he changed his story
and said, yeah, the patient fell and hit his head or hit her head – excuse
me – hit her head first and then went unconscious.

19 Dkt. no. 37-3, Ex. 18b, at 54.

20 Metro Officer Redell Moore was the first police officer to arrive at the scene.
21 When he arrived, the paramedics were working trying to revive the baby. When the
22 officer questioned Graham, Moore smelled the odor of alcohol coming from Graham,
23 and Graham's eyes "were also kind of sleepy and blood shot looking, a little bit like he
24 had been drinking." Moore also saw the cooler with the beer inside the apartment.

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27 ¹²Dkt. no. 37-3, Ex. 18b, at 29 & 34-35.

28 ¹³*Id.*, at 52-53.

1 Moore testified that he would have performed a field sobriety test on Graham if it had
2 been a traffic stop.¹⁴

3 Officer Moore testified that Graham was “extremely distant from me,” that “[h]e
4 tried to stay away from me,” and that “[h]e tried to avoid speaking to me.” He testified
5 that Graham “kept walking away” and that he “never wanted to stay and face me and
6 talk to me,” such that Moore had to “keep asking him to stop and following him
7 throughout the apartment.” Moore described Graham as being “extremely nervous,
8 [and] his demeanor was wherever I was, he was in the other room.”¹⁵

9 Officer Moore testified as follows regarding what Graham told him about what
10 happened to the baby:

11 A: He told me that he was moving boxes from the patio
12 inside the house and inside the house out to the patio.
13 The baby was on the side of the bed and the baby
14 dropped the bottle over the side of the bed. The baby
went to get the bottle and fell down and hit her head
and become unconscious.

15 Q: Okay. Did he tell you where he was when he saw the
baby do this?

16 A: Yes, he stated he was on the patio placing the box on
17 the ledge.

18 Q: Did you go on the patio and stand where he said he
had been standing?

19 A: Yes, I did.

20 Q: From that location, could you see this bed?

21 A: You couldn’t see the bed from the location
22 where the ledge was, no.

23 Dkt. no. 37-1, Ex. 18, at 29.

24 Metro Detective Allen Garriss arrived several minutes after the patrol officers.
25 Graham then told another different version of what had happened to the baby. Graham
26

27 ¹⁴Dkt. no. 37-1, Ex. B, at 29-34.

28 ¹⁵Dkt. no. 37-1, Ex. B, at 32-33.

1 gave a recorded statement and also reenacted for Garris what allegedly had
2 happened.¹⁶

3 According to this account, the baby, who had been awake and alert up to this
4 point, was lying on the bed with her bottle but she then rolled off the bed onto the floor
5 and started crying. Graham picked her up, lay her back on the bed, and placed the
6 bottle in her mouth. However, after the baby continued crying, he picked her up and
7 lifted her up to his face holding her by her torso and blew on her face in an effort “to
8 stop her hyperventilating.” Thereafter, as the baby continued crying, he turned her
9 around and held the eight-month-old infant in a “bear hug” facing away from him.
10 Graham expressed to Garris “the emotion of being somewhat angered with the child at
11 that point,” and he stated to Garris that “he figured squeezing the child would, perhaps,
12 make it quit crying.” It then became necessary for him to administer CPR to the infant,
13 which he did after laying the baby on the floor.¹⁷

14 In contrast to Officer’s Moore’s observations, Detective Garris did not recall
15 smelling the odor of alcohol coming from Graham. However, Graham was smoking
16 cigarettes during the time that he spoke with Garris; and the detective observed the
17 cooler with beer in the apartment. The detective testified that Graham did not appear to
18 be intoxicated to him and did not slur his speech. Graham appeared to the detective to
19 be “quite upset” and “distracted” as to the infant’s condition.¹⁸

20 Forensic examination of the apartment reflected that the top of the mattress in
21 question was nineteen inches from the floor, which was covered by carpeting with
22 padding. A section of the carpet and padding was secured as evidence.¹⁹

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25 ¹⁶Dkt. no. 37-2, Ex. 18a, at 54-56, 65-74 & 98-108.

26 ¹⁷Dkt. no. 37-2, Ex. 18, at 65-73; dkt. no. 37-4, Ex. 18c, at 7-8 & 45-46 & 48
(recital in closing).

27 ¹⁸Dkt. no. 37-2, Ex. 18, at 57-58, 63, 99, 104 & 106-07.

28 ¹⁹*Id.*, at 111-16.

1 Dr. Richard Sterett, M.D., was the pediatric critical care specialist who ultimately
2 served as the lead physician during attempts to revive the baby at University Medical
3 Center in Las Vegas. He was qualified as an expert witness in pediatric care at trial
4 without objection. (Dkt. no. 37-2, Ex. 18a, at 81-86.)

5 When Chelsey Hachez arrived at the emergency room, she had no palpable
6 pulse, her heart was not contracting in a manner that would provide sufficient blood flow
7 to support life, and she was not breathing on her own. Based on these findings and the
8 acid level measured in her blood initially, Dr. Sterett testified that "it's my best opinion
9 that she was essentially dead on arrival and they [the initial trauma response team]
10 were able to resuscitate her."²⁰

11 When Dr. Sterett examined the baby, she had a steady pulse with a regular
12 heartbeat, following administration of several doses of adrenaline. However, she had
13 no spontaneous respiratory effort such that she was not breathing on her own. There
14 was swelling of her scalp, primarily at the back of her head. Her pupils were fixed,
15 dilated and nonreactive. Dr. Sterett further observed bleeding, or hemorrhaging, at the
16 back of the eyes along the retinae. He testified that this retinal hemorrhaging was a
17 sign of severe head injury. She was not responsive to painful stimulus and otherwise
18 exhibited no neurological activity.²¹

19 At that point, dopamine was being used to help drive her heart and keep her
20 blood pressure up, although her blood pressure nonetheless "was marginal at best." It
21 was taking continuous administration also of adrenaline to keep her blood pressure up.
22 Dr. Sterett called in a neurosurgeon and child neurologist to assist in the evaluation.²²

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24 ²⁰Dkt. no. 37-2, Ex. 18a, at 86 & 89-90. Paramedic Maiocco also testified that
25 they were able to get a heart rate back on the infant through several rounds of drugs.
26 Dkt. no. 37-3, Ex. 18b, at 45-46. Maiocco further testified that, looking back at the
27 totality of the circumstances presented during her care by the paramedics, "we probably
28 could have, if we so chose, to call the patient dead at the scene." *Id.*, at 51-52.

²¹Dkt. no. 37-2, Ex. 18a, at 86-89.

²²*Id.*, at 89-90.

1 A CAT scan showed multiple skull fractures or, as Dr. Sterett characterized the
2 baby's injuries, "basically her skull was fairly shattered." Her brain was starting to swell,
3 after essentially having been in cardiac arrest when she arrived and not having enough
4 blood flow to her brain. Dr. Sterett explained that, as with any body part, the brain
5 swells when it is injured. However, the skull tends to inhibit the expansion, such that the
6 brain eventually can expand to the point that it compresses its own blood supply and
7 starves itself. He testified that "that's exactly what was happening" over the course of
8 the time that the trauma team was trying to revive the baby.²³

9 The brain was swollen to the point that the blood pressure within the brain was
10 equivalent to the blood pressure outside the brain. Dr. Sterett testified that this was
11 occurring in an overall situation "where we were just basically having a lot of problems
12 just keeping her blood pressure up." Such a circumstance of equivalent blood pressure
13 does not permit blood to enter the brain and leads to brain death. After further
14 radiologic marker testing confirmed that there was no blood flow entering the brain, Dr.
15 Sterett officially pronounced Chelsey dead at 5:34 p.m.²⁴

16 Dr. Sterett testified that the type of severe injuries that he observed in Chelsey
17 could result in an infant by accident only from a high speed motor vehicle accident or a
18 fall from a height of greater than ten to fifteen feet. Even with an infant's fall from such a
19 height, the fractures would be centered in one area. Chelsey instead had sustained
20 "fractures on one side of the skull and then fractures on the other side of the skull."
21 Such fractures would not be sustained in a fall from a height.²⁵

22 Dr. Sterett elaborated that trauma affected the brain of an infant differently than it
23 did with an adult, because the heads of infants were larger and their neck muscles were
24 not as strong. Accordingly, a blow to the head of an infant will cause the neck to move
25 more violently and the brain tissue to move with greater force. The blow thus would

26 ²³Dkt. no. 37-2, Ex. 18a, at 90-92.

27 ²⁴*Id.*, at 92-94.

28 ²⁵*Id.*, at 94-95.

1 result in injury not only at the site of the initial blow but also on the opposite side of the
2 skull. The retinal hemorrhaging that Dr. Sterett observed in his examination was
3 consistent with this violent movement of the brain tissue, with resultant tearing of the
4 associated blood vessels. He testified that "that's why retinal hemorrhage is evidence
5 of not always, but most of the time, evidence of some type of significant brain injury."²⁶

6 Dr. Sterett testified that in a severe injury of this type "you may have immediate
7 loss of consciousness and you may even have immediate cardiac arrest." However,
8 "you may also have a period of time where the child will, before the swelling starts, you
9 may have a period where the child is very fussy or very sleepy, but with the severity of
10 this injury, one wouldn't expect that to last very long." He testified that "[i]n an injury
11 that's severe enough to give an arrest, [such a period could last] no more than an hour
12 at the maximum; most likely much shorter."²⁷

13 Dr. Sterett concluded his testimony with the following opinion based upon his
14 evaluation of the baby in attempting to revive her and his expertise as a pediatric critical
15 care specialist:

16 Q: So, in your opinion, this was not a fall from a bed?

17 A: No, this is not a fall from a bed. This was a traumatic
18 injury.

19 Dkt. no. 37-2, Ex. 18a, at 97.

20 After speaking with the police at the apartment, Leslie Graham went to the
21 hospital, during the time that the trauma team was trying to revive the baby. At the
22 hospital, Graham stated to Kimberly Hachez, variously, that Chelsey had fallen off the
23 bed and he had tried to give her CPR and that he was playing with her and squeezed
24 her stomach and thought that he had hurt her doing that.²⁸

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26 ²⁶Dkt. no. 37-2, Ex. 18a, at 95-96.

27 ²⁷*Id.*, at 96-97.

28 ²⁸Dkt. no. 37-1, Ex. 18, at 61-62.

1 Dr. Robert Bucklin, M.D., performed the autopsy on Chelsey Hachez' body on
2 April 7, 1996. He testified as an expert in forensic pathology. (Dkt. no. 37-2, Ex. 18a, at
3 17-24.)

4 On external examination, Dr. Bucklin did not find any bruising on the scalp, but
5 he did notice on palpation an abnormal increased mobility of the bones. X-rays
6 reflected a number of skull fractures, which were even more clearly apparent on internal
7 physical examination. X-rays further reflected separation and widening at the sutures,
8 the naturally occurring lines of separation between the bones of the infant skull. Dr.
9 Bucklin attributed this widening at the skull suture lines to the effect of intracranial
10 pressure as the infant's brain swelled. There were no other injuries or defects apparent
11 in examining the remainder of the infant's body, other than pulmonary edema (fluid
12 filling the lungs) secondary to the brain injury.²⁹

13 When Dr. Bucklin began his internal examination, he initially encountered "a very
14 massive hemorrhage," or area of bleeding, at the back of the head. He then found three
15 different skull fractures. The first was a five-inch long fracture on the left side of the
16 skull where the fractured bone was widely separated by an eighth of an inch. The
17 second was a non-separated fracture on the right side above the ear. The third was in
18 the occipital, or back, portion of the skull, consisting of an irregular rectangular shaped
19 fracture. The fractures appeared to have originated during "the same rough time frame,"
20 and there were no older healing fractures or injuries.³⁰

21 Dr. Bucklin observed bilateral retinal hemorrhaging as well as hemorrhaging
22 between superficial membranes — the dura mater and arachnoid — enveloping the brain
23 but no major hemorrhaging inside the substance of the brain tissue itself.³¹ He testified

24 ²⁹Dkt. no. 37-2, Ex. 18a, at 25-29 & 51.

25 ³⁰*Id.*, at 30-34.

26 ³¹The brain and spinal cord are enveloped by three membranes, or meninges,
27 that are referred to in superficial-to-deep order as the dura mater, arachnoid, and pia
28 mater. Dr. Bucklin thus observed bleeding into the areas between the first and second
and second and third such enveloping membranes. See dkt. no. 37-2, Ex. 18a, at 35 &
44.

1 that the subdural and subarachnoid hemorrhaging that he observed was indicative of
 2 blunt force injury. He further testified that the retinal hemorrhaging was indicative of
 3 intracranial pressure. (Dkt. no. 37-2, at 34-36.) According to Dr. Bucklin's testimony, it
 4 would take "a lot of force" to produce the three fractures observed. The three different
 5 locations reflected three different impacts. The separated fracture on the left side in
 6 particular resulted from "direct force injury to the bone itself" from "a very forceful blow."
 7 He testified that he "would not expect to find a fracture that wide from other than a
 8 rather powerful force." The depression of the skull bone into the brain space on another
 9 one of the fractures also indicated that "extensive" force was used.³²

10 Dr. Bucklin gave the following opinion testimony as to the manner in which
 11 Chelsey Hachez could have been subjected to such "rather powerful" and "extensive"
 12 trauma:

13 Q: Are any of these three fractures consistent with a fall
 14 from a bed onto the floor?

15 A: No.

16 Q: Even if it were a relatively high bed?

17 A: No, it would take a whole lot more force. A baby
 18 falling two or three feet would not gain enough
 momentum to produce this kind of an injury.

19 Q: Now, the fall from a bed wouldn't even produce one of
 these fractures, would it?

20 A: Not in my opinion.

21 . . .

22 Q: Did these [three] fractures show that there were three
 23 separate points of impact?

24 A: Yes.

25 Q: So however high the fall or the blow would need to
 26 [be to] cause this, there would need to be three
 separate blows or falls to cause the fractures?

27 A: That's right.

28 ³²Dkt. no. 37-2, Ex. 18a, at 30 & 36-38.

...

Q: Even if the child fell from a height and sustained a fracture and bounced, would the second fall be sufficient to cause one of those fractures?

A: No, because the momentum of a bounce would be very little, nowhere near enough to injure the bone.

...

Q: And, in your opinion, what is [the] cause of death?

A: In my opinion, Chelsey Hachez['] death came as a result of skull fractures and intracranial hemorrhage due to blunt force trauma.

Q: Did you form an opinion as to the cause of death or manner of death?

A: Yes, I ruled it a homicide.

Dkt. no. 37-2, Ex. 18a, at 39-41; see also *id.*, at 46.

Dr. Bucklin acknowledged that the three skull fractures that he observed also could result from a traumatic accident, such as in a car accident where a car rolled over several times and the infant's head was hit in three different places. However, he would expect in that instance to also observe injuries to other parts of the infant's body as well, and Chelsey Hachez was struck three times exclusively in the head.³³

Dr. Bucklin testified that an infant subjected to the three skull fractures would lose consciousness, as opposed to cessation of vital signs, "in terms of minutes, a very few

³³Dkt. no. 37-2, at 46-47 & 51. Moreover, there was no evidence at trial that Chelsey Hachez was involved in such a major car accident, whether on the drive down to Las Vegas on the morning of April 6, 1997, or otherwise. There was no evidence that she was in a vehicle – such as Graham's vehicle on the ride down – that sustained the major damage that would be sustained in such a multiple rollover scenario. There similarly was no evidence that any adult who was with her – such as Graham on the ride down – also sustained any injuries corresponding to such a major vehicular accident. Moreover, as discussed in the text, *infra*, there would be only a relatively small interval of time following the three skull fractures before the baby lost consciousness. A scenario under which she was involved in a never-reported major vehicular accident inflicting three skull fractures (but no other injuries) but did not lose consciousness until after Graham drove her from Pahrump to Las Vegas would be implausible to the extreme. Nor did the evidence reflect that Graham stated at any time to anyone that the baby was subjected to physical force from a car accident, as opposed to from a fall from a bed or from his own hand.

1 minutes, perhaps less” stating further that “there is no way to tell you precisely how
2 many seconds or minutes the child was fully conscious.” (Dkt. no. 37-2, Ex. 18a, at 41-
3 42 & 47-48.)

4 Dr. Thomas Sherwin, M.D., treated Chelsey Hachez for an ear infection on
5 March 25, 1996, less than two weeks before April 6, 1996. Dr. Sherwin further was
6 accepted as an expert in the fields of pediatric medicine and emergency pediatric
7 medicine. He had published two professional articles on pediatric medicine, including a
8 published article on the recognition of child abuse in the emergency room. Following
9 upon his particular work in the field, he looked for indicia of child abuse every time that
10 he treated a pediatric patient, “every time,” in “[e]very case.” If he observed signs of
11 such abuse, including specifically in the interaction between the care giver and the child,
12 he reflected that observation in his treatment notes.³⁴

13 When Dr. Sherwin observed the interaction between Kimberly Hachez and
14 Chelsey Hachez on March 25, 1996, he did not see anything in their interaction that was
15 indicative of child abuse. He observed a normal healthy baby, other than the ear
16 infection, with no evidence of child abuse, and who was active, alert, and smiling.³⁵

17 Kimberly Hachez’ parents, Judy and Robert Holzhauser, also were called by the
18 State.

19 According to Judy Holzhauser, she spoke with Leslie Graham by telephone on
20 April 6, 1996. Her phone records reflected that the call occurred at 11:56 a.m. Pacific
21 time, which would have been after the paramedics and police already had been called
22 to the couple’s apartment in Las Vegas. According to Judy Holzhauser, Graham told
23 her at that time that Chelsey was fine and was laying on the bed drinking her bottle.
24 Thereafter, after she learned of the baby’s passing, Graham told her in another
25 telephone conversation that the baby had fallen off the bed and hit her head.³⁶

26 ³⁴Dkt. no. 37-3, Ex. 18b, at 7-12.

27 ³⁵*Id.*, at 11-13.

28 ³⁶Dkt. no. 37-1, Ex. 18, at 76-82.

1 According to Robert Holzhauser, he traveled to Las Vegas and then personally
2 spoke to Graham a week after the baby's death. Graham gave him three different
3 versions of what allegedly happened. In the first version, the baby was laying on the
4 bed, rolled over to get her bottle, and fell off the bed, with Graham not stating where he
5 was at the time. In the second version, Graham heard a noise from a bedroom and
6 then went to the room where the baby was and saw her unconscious on the floor. In
7 the third version, Graham was in the kitchen, the baby rolled off the bed and started
8 crying, and he went and picked her up.³⁷

9 In all of the varying, shifting accounts attributed to Leslie Graham at trial –
10 whether to the paramedics, the police, Kimberly Hachez, or her parents – Graham
11 never told anyone that the baby was subjected to any impact or other physical force
12 other than from an alleged fall from the bed and/or from Graham himself. He spoke
13 only of the alleged fall and of his variously allegedly hitting or punching the baby's
14 stomach, giving her a chest thrust, holding her in a bear hug, giving her CPR and/or
15 squeezing her stomach. In those accounts, he spoke of no other physical force being
16 applied to Chesley Hachez, at any other time that morning, other than from the baby's
17 alleged fall from the bed and/or by Graham himself.

18 The defense presented two witnesses seeking to establish that Graham was
19 good with children.

20 Patricia Taber was Graham's ex-wife. She was pregnant with a daughter by
21 another father when she became involved with Graham. He adopted the daughter as
22 his own, and they also had another daughter together. The second daughter was
23 developmentally challenged. Taber testified that Graham was "great" with the children
24 and that she had never seen Graham hit or abuse the children, including when they
25 were screaming and crying.³⁸

27 ³⁷Dkt. no. 37-2, Ex. 18a, at 118-21.

28 ³⁸Dkt. no. 37-3, Ex. 18b, at 57-61.

1 Tracey Hutchins was involved with Graham over a four year period, and they had
2 a son together. Hutchins testified that Graham was “very caring” with children and that
3 she had never seen Graham hit or abuse their son, including when he was screaming
4 and crying.³⁹

5 Neither witness spoke directly to differences, if any, in Graham’s behavior when
6 he was drinking.

7 At the conclusion of the case, the State’s proposed jury instructions provided for
8 possible verdicts only of either first-degree murder as a result of child abuse or acquittal.
9 The State’s proposed instructions did not include a theory of first-degree murder based
10 upon a homicide allegedly having been willful, deliberate and premeditated under
11 N.R.S. 200.030(1)(a). The State’s instructions instead relied exclusively on a felony-
12 murder theory under N.R.S. 200.030(1)(b) based upon a homicide allegedly having
13 been “[c]ommitted in the perpetration or attempted perpetration of . . . child abuse.” The
14 statute defined “child abuse” as “physical injury of a nonaccidental nature to a child
15 under the age of 18 years.” N.R.S. 200.030(6)(b).⁴⁰

16 The State’s proposed instructions did not set forth any allegedly lesser included
17 offenses. The State maintained that the only possible verdicts based on the evidence
18 were first-degree murder by child abuse due to non-accidental injury or an acquittal.
19 The defense requested instructions for lesser included offenses of second-degree
20 murder and involuntary manslaughter. The state district court gave the involuntary
21 manslaughter instruction based on the premise that leaving the baby unattended on the
22 bed could be construed as acting in an unlawful manner for involuntary manslaughter if
23 the death resulted accidentally from the baby falling off the bed. The court declined to
24 give a second-degree murder instruction, accepting the State’s premise that a homicide

25 ///

27 ³⁹*Id.*, at 66-67.

28 ⁴⁰Dkt. no. 17-3, Ex. 18b, at 69-73.

1 instead through non-accidental means allowed only for a verdict of first-degree felony
2 murder by child abuse.⁴¹

3 In part pertinent to this case, the jury thus was instructed as follows with regard
4 to the murder charge:

5 INSTRUCTION NO. 5

6 Murder is the unlawful killing of a human being, with malice aforethought,
7 either express or implied. The unlawful killing may be effected by any of
the various means by which death may be occasioned.

8 INSTRUCTION NO. 6

9 Malice aforethought, as used in the definition of Murder, means the
10 intentional doing of a wrongful act without legal cause or excuse or what
the law considers adequate provocation. The condition of mind described
11 as malice aforethought may arise, not only from anger, hatred, revenge or
from particular ill will, spite, or grudge toward the person killed, but also
12 may result from any unjustifiable or unlawful motive or purpose to injure
another.

13 INSTRUCTION NO. 7

14 Express malice is that deliberate intention unlawfully to take away the life
of a fellow creature, which is manifested by external circumstances
15 capable of proof.

16 Malice shall be implied when no considerable provocation appears, or
when all the circumstances of the killing show an abandoned and
17 malignant heart.

18 INSTRUCTION NO. 8

19 Malice as applied to murder does not necessarily import ill will toward the
victim, but signifies general recklessness of others' lives and safety or
20 disregard of social duty.

21 INSTRUCTION NO. 9

22 "Child abuse" means physical injury of a nonaccidental nature to a child
under the age of 18 years.

23 INSTRUCTION NO. 10

24 Murder that is the result of child abuse is Murder in the First Degree.

25 Dkt. no. 37-7, Ex. 19.

26 ///

27
28 ⁴¹*Id.*, at 70-87.

1 The court instructed that the jury possibly could return a verdict of involuntary
2 manslaughter if the jury ruled out first-degree murder. The court instructed, *inter alia*:

3 INSTRUCTION NO. 13

4 Involuntary Manslaughter is the killing of a human being, without any
5 intent to do so, in the commission of an unlawful act or a lawful act which
6 probably might produce such a consequence in an unlawful manner; but
7 where the involuntary killing occurs in the commission of an unlawful act,
which, in its consequences, naturally tends to destroy the life of a human
being, or is committed in the prosecution of felonious intent, the offense is
Murder.

8 Dkt. no. 37-7, Ex. 19.

9 **C. Relevant Direct Appeal Holdings**

10 On direct appeal from the conviction, Graham argued that the state district court
11 improperly had rejected the defense request to include a lesser included offense charge
12 also for second-degree murder.

13 The Supreme Court of Nevada rejected Graham's argument in a published
14 opinion extensively discussing the issue. See *Graham v. State*, 116 Nev. 23, 992 P.2d
15 255 (2000). The court held, *inter alia*, that: (1) a murder done in an enumerated manner
16 under N.R.S. 200.030(1)(b), such as in the perpetration of child abuse, constitutes first-
17 degree murder as a matter of law if it was done in the enumerated manner as shown by
18 the facts of the particular case; (2) an alleged absence of deliberation or premeditation
19 is immaterial to a charge of first-degree murder by child abuse and thus cannot reduce
20 the offense to second-degree murder; (3) it thus is unnecessary to instruct juries on
21 second-degree murder "when proofs in the case can only support a theory of guilt" done
22 in the enumerated manner; and (4) Graham's argument for a second-degree murder
23 instruction "was inconsistent with any of the evidence in this case because the only
24 cause of death proved below was the administration of the three separate skull
25 fractures, which could not have resulted from an accidental fall from the bed." 992 P.2d
26 at 258. The court further concluded that the involuntary manslaughter instruction should
27 not have been given because, *inter alia*, "[l]eaving a child alone on an ordinary bed
28 under the circumstances described is not an 'unlawful' act of either neglect or

1 endangerment.” 992 P.2d at 259. The court acknowledged that it would have been
2 error to not give second-degree murder and involuntary manslaughter instructions had
3 there been evidence consistent with a theory of neglect or endangerment. However,
4 the court concluded that “the proofs before this jury were only consistent with a finding
5 of either guilty of child-abuse murder or not guilty.” *Id.*

6 **D. Relevant State Post-Conviction Submissions and Proceedings**

7 On state post-conviction review, Graham alleged, *inter alia*, that he was denied
8 effective assistance of trial counsel because counsel did not present expert testimony
9 supporting a theory of defense of child neglect or endangerment in support of a lesser
10 included second-degree murder charge. Graham was represented by appointed
11 counsel in the state post-conviction proceedings.

12 Graham, through counsel, sought an extension of time to obtain and present
13 medical evidence establishing what defense counsel could have and should have
14 presented at trial that would have supported a second-degree murder charge.
15 Ultimately, on January 16, 2002, the state district court granted petitioner’s request to
16 take the post-conviction case off the calendar so that he could develop and present
17 such evidence.⁴²

18 Over five years later, on June 26, 2007, Graham moved to reset the matter and
19 moved also for authorization of funds to retain an expert witness. The motion referred
20 to allegedly related expert testimony reflected in a Nevada case published in 2000,
21 three years after Graham’s 1997 trial. Petitioner further attached approximately sixty
22 pages of medical treatises and other materials in support of the request for funds for an
23 expert witness. The materials were presented to establish that expert medical testimony
24 potentially could call the cause of the baby’s death advanced by the State at trial into
25 question.⁴³

26
27 ⁴²Dkt. no. 42, Exhs. 24-26.

28 ⁴³Dkt. nos. 22-13 & 22-14, Ex. 12 (two parts).

1 Review of the supporting materials tendered reflects the following.

2 *First*, while the materials were presented in support of a request for expert
3 witness funding, it nonetheless remains noteworthy at the outset that none of the
4 materials constituted expert opinion testimony applying the generalities discussed to the
5 facts of Graham's case. Petitioner's initial showing consisted only of the treatises and
6 other materials coupled with counsel's argument. Such materials of course did not
7 constitute a substitute for expert opinion testimony applied to the particular case. The
8 documents instead merely constituted an assemblage of treatises and other materials
9 that in and of themselves would have not been admissible as competent evidence
10 outside of expert testimony.

11 *Second*, it is subject to substantial question whether all of the material constituted
12 peer-reviewed material and/or material that otherwise properly would be relied upon by
13 an expert witness. A writing by a physician does not automatically qualify. The source
14 and date of some of the material is not even clear.⁴⁴

15 *Third*, none of the materials appear to have been published or available at the
16 time of Graham's trial; and none of the expert testimony from the allegedly similar case
17 referred to by counsel had been presented prior to Graham's June 1997 trial. Even the
18 literature that was neither dated nor sourced clearly was generated subsequent to
19 Graham's trial, given that the material cited other material published after the date of the
20 trial.⁴⁵

21 *Fourth*, literature discussing whether subdural hemorrhaging and retinal
22 hemorrhaging could occur without child abuse, whether such findings thus could
23 produce a misdiagnosis of child abuse by "shaken baby syndrome," and/or whether
24 ///

26 ⁴⁴Dkt. no. 22-14, Ex. 12, Exhs. 3, 4 & 6 thereto (at electronic pages 7-20 & 25-
27 45).

28 ⁴⁵As discussed further, *infra*, trial counsel's performance necessarily is assessed
based upon counsel's perspective *at the time of trial*.

1 such findings instead could occur from a vaccine or vaccine preservative completely
2 begged the question in Graham's case.

3 The medical expert findings of child abuse in Graham's case were not premised
4 merely upon a finding of subdural hemorrhage and retinal hemorrhage. The medical
5 expert findings of child abuse in his case instead were based upon the presence of
6 three skull fractures. None of the materials presented suggested that an infant could
7 sustain three skull fractures without child abuse or a catastrophic accident not reflected
8 by the evidence in Graham's case. None of the materials suggested that the presence
9 of three skull fractures could lead to a misdiagnosis of "shaken baby syndrome."
10 Indeed, no diagnosis of "shaken baby syndrome" ever had been made in Graham's
11 case; and the medical experts instead testified that the three skull fractures resulted
12 from blunt force trauma directly to the baby's head. None of the materials suggested
13 that an adverse reaction to a vaccine or vaccine preservative could produce three skull
14 fractures in an infant.⁴⁶ Graham's case, involving three skull fractures, had nothing to
15 do with either "shaken baby syndrome" or an adverse product reaction.

16 *Fifth*, the materials regarding injuries from falls contained neither case studies
17 nor discussion reflecting that a baby could sustain three skull fractures from a horizontal
18 fall from 19 inches onto a carpeted and padded floor. General discussion suggesting
19 that a child or infant possibly could sustain subdural hemorrhaging and/or retinal
20 hemorrhaging from a playground fall from as little as two feet did not suggest that a
21 baby could sustain three skull fractures from a horizontal fall of 19 inches onto a
22 carpeted and padded floor.⁴⁷

23 ///

24
25 ⁴⁶See dkt. no. 22-14, Ex. 12, Exhs. 2-6 thereto.

26 ⁴⁷See dkt. no. 22-13, Ex. 12, Ex. 1 thereto. Moreover, case studies that
27 measured the distance involved from the height of a child's feet when standing on, e.g.,
28 playground equipment, necessarily understated the distance that the head would travel
in such a fall. Here, the baby – at least according to some of Graham's varying accounts
– would have fallen from a horizontal position off a bed that was only 19 inches high.

1 *Sixth*, the materials regarding injuries from falls similarly contained neither case
2 studies nor discussion reflecting that a baby plausibly would remain alert and active for
3 an hour or more after sustaining three skull fractures from blunt force trauma. The
4 materials included case studies where a child would remain substantially asymptomatic
5 and active for a significant period of time after an initial fall and injury before
6 succumbing. None of the cases, however, involved an infant with three skull fractures.⁴⁸

7 *Seventh*, discussion of autopsy protocols and preserving blood from subdural
8 hemorrhaging for lab analysis also largely begged the question. Nothing in the materials
9 or in post-conviction counsel's lay presentation identified any alleged protocol failure by
10 Dr. Bucklin that would produce a false autopsy finding of three skull fractures. Nothing
11 in the materials reflected that further analysis of blood from subdural hemorrhaging
12 could override the immediately apparent finding that the baby died, in a span of minutes
13 not days, from the blunt force trauma necessary to inflict three skull fractures.⁴⁹ The
14 case, again, was not a "shaken baby syndrome case" where only internal hemorrhaging
15 was present and potentially might lead an expert to reach different conclusions if blood
16 samples were analyzed further.

17 The state district court granted petitioner's request for funds for an expert
18 witness, based upon the representation that such funds had not been available earlier,
19 either when the case was tried or on post-conviction review. The court thereafter
20 allowed petitioner a total of another five months to develop expert witness testimony
21 supporting his claims.⁵⁰

22 On January 24, 2008, petitioner did not tender an executed expert report.
23 Petitioner instead tendered an unsigned declaration represented to be a typed version

24 ///

26 ⁴⁸*Id.*

27 ⁴⁹See dkt. No. 22-14, Ex. 6; see also dkt. no. 22-13, at 15-18 (memorandum).

28 ⁵⁰Dkt. no. 42, Exhs. 27-31.

1 of a handwritten declaration given to counsel by Dr. Todd Cameron Grey, M.D., as an
 2 alleged expert forensic pathologist.⁵¹

3 In pertinent part, the typewritten material stated, *inter alia*:

4 Having reviewed the above documents [see note *infra*] and that were
 5 provided to me, I believe that the child's death is consistent with child
 6 abuse, I believe that a non medically trained person who did not handle
 7 the child or place the child would not necessarily have been able to
 8 distinguish between sleep and the consequences of the child's head
 injury. However, a reasonable care giver would have noticed the child
 was experiencing medical difficulties and not just sleeping and would have
 sought immediate health care.

9 Dkt. no. 42, Ex. 32, at 2.⁵²

10 It does not appear that petitioner ever tendered to the state district court
 11 thereafter a declaration actually executed by a witness.

12 The state district court denied relief without an evidentiary hearing. The court
 13 noted that "[a]fter a five year delay, all that has been provided to the court is defense
 14 counsel's own version of an equivocal statement made by the doctor." The court found
 15 in pertinent part that "[t]he hearsay declaration offered by Dr. Grey does not establish a
 16 reasonable probability of a more favorable result had trial counsel obtained similar
 17 medical testimony at the time of trial."⁵³

18 ///

19 ///

21 ⁵¹Dkt. no. 42, Ex. 32. The state court filing referred to an attached curriculum
 22 vitae, but it does not appear that one was attached with the filing in the state court. The
 Court's order directed that respondents file a copy of the declaration and all documents
 attached therewith. See dkt. no. 41, at 2.

23 ⁵²The typewritten material reflected that the expert had reviewed the autopsy
 24 report, the coroner's investigation report, a "transcript excerpt of the testimony of Dr.
 25 Bucklin," a paramedic report, an unidentified statement by Graham, and the state
 26 supreme court's opinion [which provided only a brief three-paragraph outline of the
 27 facts]. The typewritten material did not reflect that the expert had reviewed the
 28 testimony of the trauma room pediatric critical care specialist, Dr. Sterett. Nor did the
 material reflect that the expert had reviewed any of the trial testimony reflecting the
 circumstances on the morning of the baby's death and further reflecting Graham's
 multiple varying accounts of the incident.

⁵³Dkt. no. 22-15, Ex. 13, at 3.

1 The state supreme court affirmed on the post-conviction appeal. The Court
2 discusses the state supreme court's reasons, *infra*, in the discussion of petitioner's
3 federal claims.

4 **II. GOVERNING LAW**

5 The Antiterrorism and Effective Death Penalty Act (AEDPA) imposes a "highly
6 deferential" standard for evaluating state-court rulings that is "difficult to meet" and
7 "which demands that state-court decisions be given the benefit of the doubt." *Cullen v.*
8 *Pinholster*, 131 S.Ct. 1388, 1398 (2011). Under this highly deferential standard of
9 review, a federal court may not grant habeas relief merely because it might conclude
10 that the state court decision was incorrect. 131 S.Ct. at 1411. Instead, under 28 U.S.C.
11 § 2254(d), the court may grant relief only if the state court decision: (1) was either
12 contrary to or involved an unreasonable application of clearly established law as
13 determined by the United States Supreme Court; or (2) was based on an unreasonable
14 determination of the facts in light of the evidence presented at the state court
15 proceeding. 131 S.Ct. at 1398-1401.

16 A state court decision is "contrary to" law clearly established by the Supreme
17 Court only if it applies a rule that contradicts the governing law set forth in Supreme
18 Court case law or if the decision confronts a set of facts that are materially
19 indistinguishable from a Supreme Court decision and nevertheless arrives at a different
20 result. *E.g.*, *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003). A state court decision is
21 not contrary to established federal law merely because it does not cite the Supreme
22 Court's opinions. *Id.* Indeed, the Supreme Court has held that a state court need not
23 even be aware of its precedents, so long as neither the reasoning nor the result of its
24 decision contradicts them. *Id.* Moreover, "[a] federal court may not overrule a state
25 court for simply holding a view different from its own, when the precedent from [the
26 Supreme] Court is, at best, ambiguous," 540 U.S. at 16, because a decision that does
27 not conflict with the reasoning or holdings of Supreme Court precedent is not contrary to
28 clearly established federal law.

1 A state court decision constitutes an “unreasonable application” of clearly
2 established federal law only if it is demonstrated that the state court’s application of
3 Supreme Court precedent to the facts of the case was not only incorrect but “objectively
4 unreasonable.” *E.g.*, *Mitchell*, 540 U.S. at 18; *Davis v. Woodford*, 384 F.3d 628, 638
5 (9th Cir. 2004).

6 To the extent that the state courts’ factual findings are challenged, the
7 “unreasonable determination of fact” clause of § 2254(d)(2) controls on federal habeas
8 review. *E.g.*, *Lambert v. Blodgett*, 393 F.3d 943, 972 (9th Cir. 2004). This clause
9 requires that the federal courts “must be particularly deferential” to state court factual
10 determinations. *Id.* The governing standard is not satisfied by a showing merely that
11 the state court finding was “clearly erroneous.” 393 F.3d at 973. Rather, AEDPA
12 requires substantially more deference:

13 [I]n concluding that a state-court finding is unsupported by
14 substantial evidence in the state-court record, it is not enough that we
15 would reverse in similar circumstances if this were an appeal from a
16 district court decision. Rather, we must be convinced that an appellate
panel, applying the normal standards of appellate review, could not
reasonably conclude that the finding is supported by the record.

17 *Taylor v. Maddox*, 366 F.3d 992, 1000 (9th Cir. 2004); *see also Lambert*, 393 F.3d at
18 972.

19 Under 28 U.S.C. § 2254(e)(1), state court factual findings are presumed to be
20 correct unless rebutted by clear and convincing evidence.

21 On a claim of ineffective assistance of counsel, a petitioner must satisfy the two-
22 pronged test of *Strickland v. Washington*, 466 U.S. 668 (1984). He must demonstrate
23 that: (1) counsel’s performance fell below an objective standard of reasonableness; and
24 (2) counsel’s defective performance caused actual prejudice. On the performance
25 prong, the issue is not what counsel might have done differently but rather is whether
26 counsel’s decisions were reasonable from his perspective at the time. The court starts
27 from a strong presumption that counsel’s conduct fell within the wide range of
28 reasonable conduct. On the prejudice prong, the petitioner must demonstrate a

1 reasonable probability that, but for counsel's unprofessional errors, the result of the
 2 proceeding would have been different. *E.g., Beardslee v. Woodford*, 327 F.3d 799,
 3 807-08 (9th Cir. 2003).

4 While surmounting *Strickland's* high bar is "never an easy task," federal habeas
 5 review is "doubly deferential" in a case governed by AEDPA. In such cases, the
 6 reviewing court must take a "highly deferential" look at counsel's performance through
 7 the also "highly deferential" lens of § 2254(d). *Pinholster*, 131 S.Ct. at 1403 & 1410.

8 The petitioner bears the burden of proving by a preponderance of the evidence
 9 that he is entitled to habeas relief. *Pinholster*, 131 S.Ct. at 1398.

10 **III. DISCUSSION**

11 **A. Grounds 1 and 2**

12 In Grounds 1 and 2, petitioner alleges in principal part that he was denied
 13 effective assistance of counsel in violation of the Sixth and Fourteenth Amendments
 14 because trial counsel did not present expert medical testimony providing a factual basis
 15 for a lesser included offense instruction for second-degree murder and/or second-
 16 degree murder by child neglect. Petitioner alleges that he would not have been
 17 convicted of first-degree murder if the jury had been so instructed.⁵⁴

18
 19 ⁵⁴The Court has been unable to discern a distinction with a substantial difference
 20 between Grounds 1 and 2 in the petition, and it therefore discusses the grounds
 21 together.

22 To the extent, if any, that petitioner seeks relief separately for an exhausted legal
 23 claim alleging a "due process" violation based on alleged ineffective assistance of
 24 counsel, the Due Process Clause of the Fourteenth Amendment provides no greater
 25 protection in the context presented than does the Sixth Amendment.

26 Petitioner additionally refers to the failure of defense counsel to present expert
 27 medical testimony at the preliminary hearing. Assuming, *arguendo*, that such a claim is
 28 exhausted, there is not a reasonable probability that, but for a failure to present defense
 medical testimony at the preliminary hearing the outcome of the proceeding would have
 been different. Given the slight burden on the State at such a Nevada proceeding, there
 is not a reasonable probability of petitioner not being bound over to the district court on
 the first-degree murder charge. Thereafter, what was presented at the preliminary
 hearing would have had no bearing on the jury's consideration of the case at trial.
 While lay habeas petitioners often believe that the defense can win the case at the
 preliminary hearing by presenting opposing evidence, that belief generally is not well-
 founded given the State's slight burden of proof at a preliminary hearing under the
 governing Nevada state law. Presenting defense evidence at a preliminary hearing thus
 (fn. cont...)

1 The Supreme Court of Nevada rejected the claims presented to that court on
 2 state post-conviction review on the following grounds:

3 Appellant argues that the district court erred in denying his claim that trial
 4 counsel was ineffective for failing to present expert medical testimony in
 5 support of his theory of second-degree murder. Appellant claims that he
 6 was prejudiced by trial counsel's performance because the district court
 7 denied appellant's request for jury instructions on second-degree murder
 8 because there was no evidentiary support. By definition, a murder
 9 occurring during the perpetration of child abuse is first-degree murder.
 10 1995 Nev. Stat., ch. 168, § 1, at 257 and ch. 443, § 44, at 1181-82.
 11 Appellant argues that second-degree felony murder is a lesser included
 12 offense to first-degree murder if it is shown that the death occurred as a
 13 result of neglect. See *Sheriff v. Morris*, 99 Nev. 109, 118-19, 659 P.2d
 14 852, 859 (1983) (concluding that a defendant can be charged with
 15 second-degree felony murder if the victim died during an inherently
 16 dangerous felony committed by the defendant that is not one of the
 17 enumerated felonies constituting first-degree felony murder). Appellant
 18 argues that the failure of trial counsel to present expert evidence that the
 19 child's death was caused by neglect rather than abuse constituted
 20 ineffective assistance of counsel.

21 Based on our review of the record on appeal, we conclude that appellant
 22 failed to demonstrate that he was prejudiced by trial counsel's
 23 performance. We concluded on direct appeal that the evidence presented
 24 at trial was only consistent with a finding of either guilty of child-abuse
 25 murder or not guilty. *Graham*, 116 Nev. at 31, 922 P.2d at 259. In his
 26 petition, to support his theory of second-degree murder, appellant
 27 provided the unsworn, unsigned affidavit of Dr. Todd Grey which stated
 28 that the injuries suffered by the child were consistent with child abuse, but
 that if the person who was watching the child was not the one who caused
 the injuries, then that person was only unreasonable in not seeking help
 for the child.

The district court found this unsigned, unsworn declaration by Dr. Grey
 equivocal and unpersuasive. We agree. Even if this unsworn, unsigned
 affidavit was sufficient to show appellant was neglectful in not seeking
 medical treatment, appellant has not alleged that someone else committed
 the child abuse. His theory at trial was that the child received her injuries
 from falling from a bed. Testimony at trial and the affidavit provided in
 appellant's petition, support the conclusion that the injuries to the child
 were caused by child abuse. Therefore, appellant failed to provide
 sufficient evidence that had trial counsel presented Dr. Grey's statement
 that there was a reasonable probability that the district court would have
 allowed instructions on second-degree murder or that the jury would have

(...fn. cont.)

typically (a) does not benefit the defense and (b) provides the State gratuitous discovery
 of the defense's case.

To the extent that any of the claims discussed in this footnote are unexhausted,
 the Court finds them to be without any colorable merit and accordingly dismisses the
 claims under § 2254(b)(2), in the alternative to a dismissal on deferential review under
 AEDPA.

1 found appellant guilty of second-degree murder rather than first-degree
murder. Therefore, the district court did not err in denying this claim.

2 Dkt. no. 22-18, Ex. 16, at 2-3.

3 The state supreme court's holding that petitioner failed to carry his burden of
4 demonstrating prejudice was neither contrary to nor an unreasonable application of
5 *Strickland* or other controlling Supreme Court precedent.

6 The purported expert declaration presented on state post-conviction review did
7 not in any sense contradict the abundant medical evidence presented at trial
8 establishing that Chelsey Hachez died from blunt force trauma causing three skull
9 fractures that resulted from child abuse. The purported declaration instead confirmed
10 that her death was "consistent with child abuse," while presenting no contrary expert
11 opinion whatsoever that her three skull fractures could have resulted from a cause other
12 than child abuse on the facts presented.⁵⁵

13 Graham contends that defense expert medical testimony is essential in cases of
14 alleged shaken baby syndrome. However, there was no diagnosis ever made in this
15 case of shaken baby syndrome. The literature presented by petitioner in the state courts
16 did not remotely suggest that a case of alleged shaken baby syndrome could produce
17 three skull fractures in an infant, including a fracture with a separation between the
18 shattered bone of an eighth of an inch. The purported expert declaration made
19 absolutely no assertion that the objective physical findings in the case – three skull
20 fractures – would be present where an allegedly mistaken diagnosis of shaken baby
21 syndrome had been made. Shaken baby syndrome has nothing to do with this case.

22 Nor did either the purported expert declaration or the previously tendered
23 literature opine that an infant could sustain three skull fractures from a nineteen inch fall
24 from a supine position onto a carpeted floor with padding. The purported declaration
25 instead stated that Chelsey Hachez's death was – as all of the expert medical witnesses
26 also had testified at the trial – "consistent with child abuse." Petitioner thus presented

27
28 ⁵⁵For factual background to the analysis herein, see text, *supra*, at 7-14 & 19-22.

1 no expert medical evidence on state post-conviction review tending to establish that trial
2 counsel would have been able to present expert testimony at trial supporting a theory
3 that the baby sustained three skull fractures from a fall from the bed.⁵⁶

4 Given the thus still-uncontradicted expert medical evidence that Chelsey
5 Hachez's death was consistent with child abuse, after she sustained three skull
6 fractures from blunt force trauma, the remainder of the purported expert declaration
7 begged the question. Any attempted supposition that Graham possibly at worst failed to
8 appropriately recognize and react to child abuse committed by another ignores the fact
9 that neither the trial evidence nor even Graham's own shifting accounts tended to
10 establish that another person fractured Chelsey Hachez's skull three times. In
11 Graham's own shifting accounts, the only force applied to the baby came from the
12 alleged fall – which could not cause such injury under the still-uncontradicted medical
13 evidence – or by his own hand.” The equivocal purported declaration did not include
14 any expert opinion tending to establish that the baby could have sustained three skull
15 fractures earlier while in Pahrump and remained alert, conscious, and asymptomatic
16 during the hour plus drive to Las Vegas and thereafter in the apartment before
17 succumbing at 10:20 a.m. Nothing in the trial evidence, the literature tendered on state
18 post-conviction review, or the equivocal declaration suggests that an infant could
19 sustain such grievous trauma and not succumb during that long interval. The
20 supposition that a care giver possibly might have failed to recognize and react to child
21 abuse by another simply begged the question. There was no possible instrumentality of

23 ⁵⁶Moreover, the state supreme court decision on direct appeal referred to in the
24 purported expert declaration ruled out the possibility that leaving the baby on the bed
25 could constitute even child neglect. See *Graham*, 992 P.2d at 259. If leaving the baby
26 on the bed could not constitute unlawful child neglect or endangerment, then it follows
27 with even greater force that leaving the baby on the bed could not constitute child
28 abuse. Thus, the equivocal declaration would not be referring to an alleged fall from a
bed as “child abuse.” Nor does anything stated in the purported declaration reflect that
the expert would be equating an alleged fall from a bed (while in Graham's care) with
child abuse. Nor, as discussed in the text, does the purported declaration contain any
expert opinion reflecting that such an alleged fall would cause three skull fractures.

1 child abuse consistent with the trial evidence, including in Graham's own shifting
2 statements, other than by his own hand.⁵⁷

3 The state supreme court's holding that Graham failed to demonstrate prejudice
4 under *Strickland* thus was neither contrary to nor an unreasonable application of clearly
5 established federal law. The purported expert evidence tendered on state post-
6 conviction review did not establish a plausible factual basis for a defense based upon a
7 lesser included offense of second-degree murder by child neglect under Nevada state
8 law. The state post-conviction tender did not contradict the trial medical evidence that
9 Chelsey Hachez died from child abuse, and there was no mechanism for such child
10 abuse reflected by the trial evidence other than Graham's own hand. A bare
11 supposition that Graham instead merely failed to properly recognize and react to child
12 abuse inflicted by another is not supported by competent and probative evidence
13 tendered either at trial or on post-conviction review.

14 Grounds 1 and 2 therefore do not present a basis for federal habeas relief.

15 **B. Ground 3**

16 In Ground 3, petitioner alleges in principal part that he was denied effective
17 assistance of counsel, once again, because trial counsel failed to present evidence that
18 would have allowed for the submission of instructions and a verdict form for second-
19 degree murder. Petitioner alleges on this claim that he therefore was subjected to a

20 ⁵⁷The purported declaration does not reflect that Dr. Grey reviewed any
21 testimony other than an excerpt of the testimony of the forensic pathologist who
22 performed the autopsy. The state supreme court decision that the expert reviewed
23 contained only a very brief three-paragraph broad overview of the evidence. See 992
24 P.2d at 256. Without review of the trial evidence itself – or a more detailed recital of the
25 evidence such as in this order – the expert would not have been presented with the
26 evidence that Graham left Pahrump with the baby more than an hour before the 911
27 call. The purported declaration does not present any expert opinion tending to establish
28 that the baby could have sustained three skull fractures in Pahrump but still been alive,
alert, and allegedly reaching for a bottle over an hour later in Las Vegas, to lose
consciousness and succumb only thereafter. The purported declaration speaks only
equivocally and generally without addressing how its conclusion that the baby's death
was consistent with child abuse necessarily fit in with the time line reflected by the
evidence in the case. Defense expert evidence corroborating State evidence that the
baby died from child abuse could not have established second-degree murder by child
neglect on the remaining evidence.

1 mandatory presumption of malice and guilt of first-degree murder. He contends that if
2 counsel had presented the evidence, he would have been found guilty of second-
3 degree murder or at the very least would not have been subject to such an alleged
4 mandatory presumption.⁵⁸

5 The state supreme court rejected the claim presented to that court on the
6 following grounds:

7 Appellant . . . argues that the district court erred in denying his claim that
8 trial counsel was ineffective for failing to secure a second-degree murder
9 instruction given at his trial created a "mandatory presumption" that
10 appellant was guilty of first-degree murder. Appellant appears to argue
11 that the first-degree murder instructions directed the jury to find a
12 presumed fact against the accused, however, appellant failed to explain
13 what this presumed fact is. Regardless, appellant's claim lacks merit.
14 Trial counsel requested instructions on second-degree murder. The
15 district court refused that request, and this court upheld that decision on
16 direct appeal. We explained that murder by child abuse is first-degree
17 murder as a matter of law under NRS 200.030(1) and therefore, "such
18 murders do not fall within the category of murder that can be reduced in
19 degree by failure to prove deliberation and premeditation. Nor can such a
20 murder be reduced in degree because it is committed without intent to kill
and would otherwise fall within the ambit of [second-degree felony
murder]: if done with malice and in an enumerated manner, the killing
constitutes first-degree murder by legislative fiat." *Graham*, 116 Nev. at
28-29, 992 P.2d at 258. Therefore, because the only evidence adduced at
trial demonstrated that the child's death was caused by child abuse, we
held that appellant was not entitled to second-degree murder instructions.
Moreover, it appears that the district court instructed the jury on
involuntary manslaughter. While we concluded on direct appeal that it was
error for the district court to give the involuntary manslaughter instruction,
id. at 31, 992 P.2d at 260, the giving of the instruction belies appellant's
claim that the jury was only given first-degree murder instructions. Under

21 the circumstances and considering our decision on direct appeal,
22 appellant's trial counsel was not deficient nor was appellant prejudiced by
23 trial counsel's failure to secure second-degree murder instructions in the
instant case, and therefore, the district court did not err in denying this
claim.

24 Dkt. no. 22-18, Ex. 16, at 3-4.

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26 ⁵⁸As with Grounds 1 and 2, to the extent, if any, that Graham seeks relief
27 separately for an exhausted legal claim alleging a "due process" violation based on
28 alleged ineffective assistance of counsel, the Due Process Clause of the Fourteenth
Amendment provides no greater protection in the context presented than does the Sixth
Amendment.

1 The state supreme court's holding that petitioner had failed to demonstrate either
2 deficient performance or resulting prejudice was neither contrary to nor an
3 unreasonable application of *Strickland* or other controlling Supreme Court precedent.

4 To the extent that the claim in federal and state court has been premised upon
5 the failure of trial counsel to present an evidentiary basis for a second-degree murder
6 instruction, the discussion of Grounds 1 and 2 *supra* applies fully here as well. The
7 purported expert evidence finally presented on state post-conviction review — after an
8 opportunity to develop evidence spanning more than five years — corroborated rather
9 than contradicted the medical evidence at trial establishing that the baby died from child
10 abuse. Under the time line reflected by the remaining trial evidence, which the post-
11 conviction expert apparently did not review, there was no plausible mechanism by which
12 such child abuse was inflicted other than by petitioner. A supposition that Graham
13 could have been guilty only of child neglect in failing to recognize child abuse committed
14 by another was belied by the trial evidence, which remained uncontradicted on state
15 post-conviction review. Under the uncontradicted evidence, the baby would have lost
16 consciousness and succumbed within a short interval after being subjected to sufficient
17 blunt force trauma to fracture her skull three times. She would not have been alert and
18 asymptomatic with such grievous injuries more than an hour later after the drive from
19 Pahrump to Las Vegas. Petitioner accordingly failed to demonstrate that there was an
20 evidentiary presentation that could have been made by trial counsel that would have
21 supported a lesser included instruction for second-degree murder by child neglect.

22 Moreover, regarding *Strickland's* performance prong, none of the literature
23 presented by petitioner on state post-conviction review in support of a request for expert
24 testimony was published or available at the time of Graham's trial. In applying
25 *Strickland*, a court must evaluate trial counsel's conduct from counsel's perspective at
26 the time. See, e.g., *Harrington v. Richter*, 131 S.Ct. 770, 789 (2011). Even if, *arguendo*,
27 the literature tendered in support of state post-conviction relief had a material bearing

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1 on the case, which it did not,⁵⁹ none of the tendered literature was available to counsel
2 prior to trial. As the Supreme Court similarly observed in *Richter*, “[r]eliance on ‘the
3 harsh light of hindsight’ to cast doubt on a trial that took place now more than 15 years
4 ago is precisely what *Strickland*, and AEDPA seek to prevent.” *Id.* While the literature in
5 truth did not call the trial medical evidence into material question, reliance on such *post*
6 *hoc* material in any event is precluded under the *Strickland* analysis.

7 The state supreme court’s further subsidiary holding that the charges given did
8 not subject petitioner to a mandatory presumption under Nevada state law is the end of
9 that matter. The state supreme court is the final arbiter of Nevada state law. The state
10 supreme court’s subsidiary holding further that a second-degree murder charge was not
11 available on the facts presented under state law also is the end of that matter, for the
12 same reason.

13 In sum, petitioner has not established, after an extensive opportunity to present
14 contrary medical evidence on state post-conviction review, that there was a plausible
15 basis in law or in fact for a second-degree murder instruction on the evidence in his
16 case. The state supreme court’s rejection of the claim therefore was neither contrary to
17 nor an unreasonable application of *Strickland*.

18 Ground 3 therefore does not provide a basis for federal habeas relief.

19 **IV. CONSIDERATION OF ISSUANCE OF A CERTIFICATE OF APPEALABILITY**

20 Under Rule 11 of the Rules Governing Section 2254 Cases, the district court
21 must issue or deny a certificate of appealability (COA) if it enters a final order adverse to
22 the petitioner.

23 As to the claims rejected by the district court on the merits, under 28 U.S.C. §
24 2253(c), a petitioner must make a "substantial showing of the denial of a constitutional
25 right" in order to obtain a certificate of appealability. *Slack v. McDaniel*, 529 U.S. 473,
26 483-84 (2000); *Hiivala v. Wood*, 195 F.3d 1098, 1104 (9th Cir. 1999). To satisfy this

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28 ⁵⁹See text, *supra*, at 19-21.

1 standard, the petitioner "must demonstrate that reasonable jurists would find the district
2 court's assessment of the constitutional claim debatable or wrong." *Slack*, 529 U.S. at
3 484.

4 Reasonable jurists would not find debatable or wrong the Court's conclusion that
5 the state supreme court's rejection of petitioner's ineffective-assistance claims was
6 neither contrary to nor an unreasonable application of *Strickland*.

7 Petitioner was convicted of first-degree murder based exclusively on a felony-
8 murder theory due to the death having resulted from child abuse, after an eight-month-
9 old infant in his care died after being subjected to sufficient blunt force trauma to inflict
10 three skull fractures. Petitioner's claims in principal part allege that trial counsel was
11 ineffective for failing to present contrary medical evidence that would have supported a
12 lesser included offense instruction of second-degree murder by child neglect. The
13 current order details both the trial evidence and the material tendered on state post-
14 conviction review. The material tendered on state post-conviction review was presented
15 by the petitioner through counsel, after more than five years had been allowed to
16 develop medical evidence, and after funds for an expert were authorized. See text,
17 *supra*, at 1-23.

18 Under the trial evidence, the only medically plausible cause of the infant's death,
19 after receiving three skull fractures, was through child abuse, as, for example, the infant
20 had not been involved that morning in a major vehicular accident. The remaining
21 evidence in the case, including the varying statements given by petitioner at the time,
22 had no other force being applied to the child other than by petitioner's own hand or an
23 alleged (by petitioner) fall from a low bed onto a carpeted and padded floor. The
24 medical testimony at trial ruled out such a fall causing three skull fractures in the infant.
25 A bare supposition that the infant could have been subjected to such multiple blunt force
26 trauma before being in the petitioner's exclusive care that morning was belied by
27 medical testimony that the infant would not have remained alert and asymptomatic

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1 during the interval involved, which included an hour plus drive from Pahrump to Las
2 Vegas, Nevada. See text, *supra*, at 2-15.

3 The unsigned purported expert declaration ultimately tendered on state post-
4 conviction review corroborated rather than contradicted the trial medical testimony
5 establishing that the baby died from child abuse, after receiving three skull fractures
6 from blunt force trauma. The remaining supposition in the purported declaration that a
7 care giver possibly could have failed to recognize the baby's condition begged the
8 question, given that the only potential instrumentality of child abuse consistent with the
9 trial evidence was by petitioner's own hand. It does not appear from the recital in the
10 purported declaration of the materials reviewed that the expert reviewed the pertinent
11 trial evidence setting forth the relevant time line, including the time line reflected in
12 petitioner's own statements. The state supreme court's rejection of petitioner's claims
13 based upon such an equivocal presentation that did not contradict the extensive
14 medical evidence at trial that the baby died from child abuse accordingly was neither
15 contrary to nor an unreasonable application of clearly established federal law. There is
16 not a reasonable probability that the outcome would have been different if trial counsel
17 had presented evidence along the lines of the equivocal material presented on state
18 post-conviction review. See text, *supra*, at 18-23 & 25-32.

19 A certificate of appealability therefore will be denied as to all claims presented.

20 **V. CONCLUSION**

21 IT IS THEREFORE ORDERED that the petition is DISMISSED with prejudice on
22 the merits.

23 IT IS FURTHER ORDERED that a certificate of appealability is DENIED. See
24 text, *supra*, at 32-34.

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1 The Clerk shall enter final judgment accordingly, in favor of respondents and
2 against petitioner, dismissing this action with prejudice.

3 DATED THIS 22nd day of July 2013.

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6 MIRANDA M. DU
7 UNITED STATES DISTRICT JUDGE
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